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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-199

MORTGAGE GROWTH INVESTORS,
a Massachusetts business trust,
Appellant,

vs.

CLOW CORPORATION, a Delaware corporation, et al.,
Appellees.

MOTION TO AFFIRM JUDGMENT, AND BRIEF IN SUPPORT THEREOF

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MOTION BY APPELLEES, NATIONAL LUMBER CO. AND ROCWALL CO., TO AFFIRM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Appellees National Lumber Co. and Rocwall Co. move this Court to affirm the judgment sought to be reviewed on appeal by Appellant, Mortgage Growth Investors, on the following grounds:

A. The questions presented for review by Appellant have already been decided by this Court, on their merits, in favor of Appellees.

B. It is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

BRIEF IN SUPPORT OF MOTION

I

Appellant has appealed from a judgment of a three-judge District Court upholding the constitutionality of the Michigan Mechanic's Lien Act in reliance upon this Court's summary affirmance of a District Court judgment in *Spielman-Fond v. Hanson's, Inc.*, 417 US 901 (1974), and upon this Court's summary dismissal of an appeal from a California Supreme Court in *Connolly Development, Inc. v Superior Court*, 429 US 1056 (1977).

Appellant's attack on the statute was directed at the provisions of MCL 570.5, which require a person claiming a mechanic's lien to record a notice thereof with the local register of deeds in order to give notice to the world of his claim to a lien. Appellant asserted below that the ministerial act of the county register of deeds in accepting, filing and recording such notice was State action depriving Appellant of its property without due process of law.

The identical claim was made before a three-judge District Court in *Spielman-Fond v. Hanson's, Inc.*, 397 F Supp 997 (D. Ariz., 1972), and the Court held as follows:

> ". . . the filing of a mechanics' and materialmen's lien lien does not amount to a taking of a significant property interest, and that, accordingly, ARS §33-081 et seq. are not violative of due process of law under the Fourteenth Amendment . . ." 379 F Supp. 997 at 999.

The judgment entered by the District Court, in favor of the lien claimant, was appealed to this Court. The question presented in the Jurisdictional Statement was as follows:

> "The sole question is whether the statutes of the State of Arizona which authorize filing of Mechanics' and Materialmen's Lien against real property conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States, with particular reference to deprivation of a protected interest in property without prior notice and right to be heard."

The judgment of the three-judge Court was summarily affirmed by this Court without opinion. *Spielman-Fond v. Hanson's, Inc.*, 417 US 901 (1974).

As is the case here, the Arizona appellant's attack was directed solely at the provision of Arizona law permitting or requiring the filing of a notice of the lien in order to perfect it, an act which the Arizona District Court held "does not amount to a taking of a significant property interest."

In short, the issue raised in the Arizona court was identical to the issue in this case, the Arizona District Court decided the issue in favor of the lien claimant, the appeal to this Court presented only that issue for determination, and this Court affirmed the judgment of the Arizona District Court.

In *Connolly Development, Inc. v. Superior Court, supra*, this Court dismissed, for want of a substantial federal question, an appeal from the Supreme Court of California, which upheld the constitutionality of the California Mechanic's Lien Act.

Under the decisions of this Court in *Hicks v. Miranda*, 422 US 332 (1975) and *McCarthy v. Philadelphia Civil Service Commission*, 424 US 645 (1975), a summary dismissal of an appeal from a State Court decision for want of a substantial federal question is a decision on the merits and must be followed by lower courts. The rule is the same for summary affirmances on appeals from three-judge District Courts.

To be sure, in *Mandel v. Bradley*, 432 US 173 (1977), this Court remanded the case for the lower court to consider on the merits because the lower court had erroneously relied on a summary affirmance by this Court in *Tucker v. Salera*, 424 US 959 (1976), a case involving two issues, only one of which was present in *Mandel*. However, in *Mandel*, this Court reaffirmed its holding in *Hicks*:

"Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." 432 US 173 at 176.

In the present case, the opinion of the District Court discussed *Hicks v Miranda, supra*, and *Mandel v. Bradley, supra*, examined the Mechanic's Lien Acts of Arizona, California and Michigan, examined the Jurisdictional Statements in *Spielman-Fond* and *Connolly Development* and compared the issues presented in them with the issues in this case. After doing this, the three-judge District Court said:

"On the basis of these careful comparisons we conclude that the issues raised in this case were presented to the United States Supreme Court and were found by it to be without substance. Therefore, we are bound to uphold the constitutionality of the Michigan Mechanics' Lien Act." (Appellant's Jurisdictional Statement, P. 11-12).

"Since the due process aspects of these three mechanics' lien statutes are identical, the issues in this case are encompassed in the jurisdictional statements of the two cases summarily disposed of by the Supreme Court. We are bound by those dispositions and must uphold the constitutionality of the Michigan Mechanics' Lien Act." (Appellant's Jurisdictional Statement, P. 15).

We submit that the reasoning and opinion and judgment of the Court below are in accord with the prior opinions of this Court and we move that judgment be affirmed.[1]

II

Not only has the issue presented by Appellants already been decided by this Court in favor of Appellees, the issue itself has no substance. The United States, and the 50 States, each have many statutes providing for the creation and enforcement of consensual and nonconsensual liens, encumbrances, mortgages, security interests, and the like. This Court previously upheld the constitutionality of state mechanic's lien statutes in *Hartford Accident Co. v. Nelson Co.*, 291 US 352 (1934), and has never questioned the constitutionality of the Miller Act, 40 USC §270a-e, granting similar rights to persons furnishing labor and materials for the construction of federal public works.

Appellant does not assert the unconstitutionality of Section 1 of the Michigan Act (MCL 570.1) which creates a lien on real estate in favor of any person furnishing labor or materials for the construction of improvements thereon. Nor does Appellant attack the constitutionality of those provisions of the Michigan Act (MCL 570.10 et seq.) which require the holder of a lien, in order to foreclose it, to commence a plenary action before a

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[1] Appellant herein also argues that the Arizona statute and the Michigan statute differ in the remedies available after the filing of the notice of lien (Jurisdictional Statement, P.7). The argument is specious: the availability or non-availability of post-filing remedies is not a factor in determining whether there was a taking in the first place. In *Fuentes v. Shevin*, 407 US 67 (1972), this Court said, "The Fourteenth Amendment draws no bright lines around three day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." (407 US 67 at 86). The holding of the Arizona Court, affirmed by this Court, was that the filing of the lien did not amount to a significant taking in the first place.

court of general jurisdiction and serve summons and complaint upon the defendants, and which require a full evidentiary trial as to the validity of the lien and the amount claimed—before the lien claimant obtains a judicial order directing foreclosure of his lien by sale. The procedural provisions of the Michigan statutes clearly grant full due process protection to a property owner before he is deprived of title, possession, enjoyment or use of his property.

The recent decisions of this Court relating to the enforcement of liens, from *Sniadach v. Family Finance Corp. of Bay View*, 395 US 337 (1969), through *Flagg Brothers, Inc. v. Brooks*, _____US_____, 46 LW 4438 (5/15/78), have dealt solely with the method of enforcing a consensual lien or statutory lien by the seizure, sequestration, or sale of property belonging to the debtor. The issue before this Court in *Sniadach* was not whether a State could constitutionally permit a creditor to garnishee wages. The issue was whether the State could permit the sequestration of the wages before judgment, without affording the debtor an opportunity to be heard. The issue before this Court in the recent *Flagg Brothers* case was not whether a State could constitutionally grant a warehouseman a lien upon property stored with him—it was whether the statute could constitutionally permit the warehouseman to sell the stored property without court proceedings. In the case now before this Court, the Appellant argues that it has a constitutionally protected right to a hearing in order to determine the amount and validity of a claim before a person furnishing labor and materials can record a notice of his statutorily created lien. This assertion is completely without merit and is not based on any decision of this Court.

Precisely the same argument could be made in almost every instance where a recording of notice is required in order to perfect a lien. For example:

a) Notices of tax liens are filed by federal and state officials without any prior judicial determination of the amount owing.

b) In many commercial transactions, a real estate mortgage is

executed contemplating future advances in which the face amount of the mortgage greatly exceeds the amount actually advanced at that time by the mortgagee. A mortgagee may make a $10,000 advance and record a mortgage reciting that it secures a debt of $100,000. Clearly, the mortgagor is not entitled to any judicial hearing as to the amount of his debt prior to the recording of the mortgage.

c) Section 9-402 of the Uniform Commercial Code permits a financing statement to be filed with State or local officials before there is any indebtedness, and even before there has been an agreement to give security. Again, no judicial hearing is required prior to such filing.

Although a mechanic's lien holder may file a claim of lien in which he asserts more money owing than is actually owing, it is equally true that a mortgagee can record a mortgage which recites a greater debt than is actually owing. As is well known to every person who makes monthly mortgage payments, the face amount of the recorded mortgage does not establish the indebtedness at any time. The mere fact that there may be an instrument on record reciting a debt greater than that actually owed does not mean that the debtor has been deprived of any interest in his property. The filing or recording of a claim to mechanic's lien has "the same effect as to notice against subsequent purchasers or encumbrances as the recording of a mortgage." MCL 570.5. It is not the recording of the statement which creates the lien; it was created the instant labor or materials were furnished in the construction of the improvements.

The Michigan Act does not permit non-judicial foreclosure of the lien. It does not permit the lien claimant to take possession of the property or to sell it, until he has started a suit, served the defendant, won a trial, and obtained a judicial order of foreclosure. The owner of the property affected by the lien is granted every possible procedural safeguard before he is deprived of any interest in his property.

The mere filing of a notice of mechanic's lien does not de-

prive an owner of any property. It does not prevent him from continuing to enjoy the property, to use it, to occupy it, and to collect rents from the building constructed with the labor and materials of unpaid lien claimants. It does not prevent him from selling the property subject to the liens, nor does it prevent him from selling the property and paying the unpaid lien claimants.

The only thing an owner cannot do with his land after the recording of a notice of lien is sell it free and clear of the liens. To permit him to do so would serve no useful social purpose and in a sense would deprive Appellees and others similarly situated of their property without due process of law.

Respectfully submitted,

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